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No. 89-779

In the Supreme Court of the United States

OCTOBER TERM, 1989

MARTIN SCHWIMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether compelling petitioner to testify before a grand jury while the appeal from his conviction was pending violated the Fifth or Sixth Amendments or the ethical prohibition of attorney contacts with represented persons.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 882 F.2d 22. The opinion of the district court holding petitioner in contempt (Pet. App. A21-A24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1989. A petition for rehearing was denied on September 14, 1989. The petition for a writ of certiorari was filed on November 13, 1989. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 16, 1987, a grand jury sitting in the Eastern District of New York returned an indictment charging petitioner with conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); conspiring to defraud the United States, in violation of 18 U.S.C. 371; 76 counts of receiving illegal payments to influence the operations of an employee benefit plan, in violation of 18 U.S.C. 1952; and six counts of tax evasion, in violation of 26 U.S.C. 7201. The indictment alleged that petitioner and his co-defendants skimmed $14 million in concealed commissions from the benefit plans of two union locals. Pet. App. A3. The indictment also charged that as part of the scheme, petitioner made illegal payments to several union officials. After a jury trial at which petitioner did not testify, he was convicted of the charged offenses. On February 14, 1989, petitioner was sentenced to ten years' imprisonment, fined $1.6 million, and ordered to forfeit $4.5 million. Pet. App. A3. Petitioner appealed his conviction.

At the close of the sentencing proceedings, petitioner was served with a subpoena to appear before a grand jury investigating the activities of the union officials to whom petitioner had made illegal payments. The grand jury issuing the subpoena is not the same grand jury that indicted petitioner, although the prosecutor who tried petitioner's case is handling the grand jury investigation. Pet. App. A3-A4.

On March 8, 1989, petitioner appeared before the grand jury and was presented with an order, signed by the Chief Judge of the United States District Court for the Eastern District of New York, compelling him to testify pursuant to a grant of use immunity under 18 U.S.C. 6002. Despite the grant of immunity, petitioner refused to testify,

claiming that his compelled testimony before the grand jury without his attorney would violate his Fifth and Sixth Amendment rights as well as the ethical prohibition against attorney contacts with persons who are represented by counsel. Pet. App. A4.

Petitioner moved to quash the subpoena, and the government moved for an order holding petitioner in contempt for his refusal to testify. After a hearing, the district court granted the government's motion. It found (Pet. App. A22-A23) that the grant of use immunity protected petitioner's Fifth Amendment privilege against compelled self-incrimination and his Sixth Amendment right to counsel. The court therefore held petitioner in contempt of court but suspended the order of confinement pending his appeal of the contempt order.

2. The court of appeals affirmed. It first held (Pet. App. A7) that a grant of use immunity to obtain testimony from a convicted defendant whose appeal is pending does not violate the defendant's Fifth Amendment privilege against compelled self-incrimination. Because the immunity order prohibits the government from making direct or indirect use of petitioner's testimony, the court held, his testimony before the grand jury could not incriminate him with regard to the case on appeal, even if the appeal resulted in a reversal and a new trial. The court further held (Pet. App. A10-A14) that the grant of use immunity protected petitioner's Sixth Amendment right to counsel during appeal. In particular, the court found that petitioner's testimony would not compromise his counsel's ability to argue on appeal that the evidence was insufficient to support petitioner's conviction. Finally, the court rejected petitioner's claim that the prosecutor's act of questioning him before the grand jury outside the presence of his counsel would violate Disciplinary Rule 7-104(A)(1) of the Model Code of Professional Responsibility, which forbids attorneys from

contacting persons who are represented by counsel unless the contacts are authorized by law. The prosecutor's act of questioning petitioner on behalf of the grand jury, the court held, would clearly be "authorized by law." Pet. App. A14-A16.

3. On December 27, 1989, the court of appeals ruled on petitioner's direct appeal of his conviction. The court remanded the case to the district court for a hearing on whether the government's case at petitioner's trial was derived from a violation of the attorney-client privilege in regard to confidential communications passing from petitioner to an accountant hired by his attorneys to assist in the preparation of his defense. The court did not rule on petitioner's remaining contentions. Instead, it retained jurisdiction of the appeal pending the district court's decision on remand.

ARGUMENT

Petitioner renews his contentions (Pet. 15-45) that his compelled testimony before the grand jury without the presence of his counsel would violate his Fifth Amendment privilege against compelled self-incrimination, his Sixth Amendment right to counsel, and Disciplinary Rule 7-104(A)(1). These contentions are without merit.

1. Petitioner first claims (Pet. 16-35) that his compelled testimony before the grand jury will violate his Sixth Amendment right to the effective assistance of counsel on appeal from his conviction. He argues that, absent a waiver, the Sixth Amendment prohibits all contact between the government and a defendant outside the presence of counsel between his indictment and the conclusion of his direct appeal. In addition, petitioner claims that the court of appeals erred in finding that the grant of use immunity would protect that right.

The proposed questioning of petitioner before the grand jury is not part of the investigation or prosecution of petitioner; it is part of the investigation of others for conduct in which petitioner was involved. The grant of use immunity for petitioner's testimony ensures that petitioner's testimony before the grand jury will not be used in any further proceedings against him, but will be used only against other persons who are under investigation. While petitioner enjoys a Sixth Amendment right to counsel with respect to the appellate proceedings in his own case, the grand jury testimony that he is being asked to provide is not properly viewed as part of those proceedings. Even though the subject matter of the grand jury's questions may relate to the subject matter of the charges in petitioner's case, the fact that petitioner's answers cannot be used against him means that petitioner's grand jury appearance is not part of any proceedings against him. Because of the grant of immunity, petitioner is not at risk on account of anything he may say about the events that underlay the charges against him. He therefore does not enjoy a Sixth Amendment right to the presence of counsel with respect to the grand jury's investigation, which is solely directed at other persons. See *Maine* v. *Moulton*, 474 U.S. 159, 180 n.16 (1985) (even when defendant has been indicted and is represented, Sixth Amendment does not apply to questioning that relates to offenses other than those with which he is charged).

Even if petitioner would enjoy a Sixth Amendment right to counsel with respect to his appearance before the grand jury, that right would not entitle him to insist that his counsel accompany him into the grand jury room. Instead, as the court of appeals held, petitioner's ability to consult with counsel during recesses in the grand jury proceedings would fully protect his Sixth Amendment right to counsel. Since the government may not directly or indirectly use petitioner's grand jury testimony in any current or subsequent

proceeding against petitioner, see *Kastigar* v. *United States*, 406 U.S. 441, 460-462 (1972), the need for the presence of counsel to protect the defendant from improvident admissions is not present in this setting. Accordingly, the application of Rule 6(d) Fed. R. Crim. P., which bars petitioner's counsel from accompanying him into the grand jury room, would not violate the Sixth Amendment.

Petitioner fails to point to any way in which his testimony before the grand jury would infringe his Sixth Amendment right to counsel on his appeal. It is difficult to foresee, at least in advance of his appearance before the grand jury, how his immunized grand jury testimony might adversely affect his counsel's presentation and argument of issues to the court of appeals. Moreover, now that petitioner's counsel has briefed and argued petitioner's case on appeal, it appears that no issue petitioner has raised in the court of appeals would be affected by the content of any testimony petitioner would be likely to give before the grand jury.

Petitioner argues that his counsel's effectiveness on appeal may be undercut because he may be ethically foreclosed from asserting petitioner's innocence on appeal if petitioner makes incriminating statements before the grand jury. This claim fails for two reasons. First, petitioner's brief in the court of appeals did not challenge the sufficiency of the evidence to support his conviction. Second, even if counsel had raised the issue, petitioner would only have to show that the evidence was not sufficient to justify the jury's verdict. No breach of ethics occurs when an attorney who knows that his client is guilty argues that the government has failed to prove his client's guilt beyond a reasonable doubt.

Petitioner's claim that his compelled grand jury testimony will violate his Sixth Amendment rights at any retrial that may be held in this case is speculative and premature. If petitioner's conviction withstands appellate review, as the

great majority of convictions do, he will not be subject to retrial. In that circumstance, petitioner's grand jury testimony would give the government no advantage in any later proceeding or adversely affect counsel's ability to represent him. See *United States* v. *Kember*, 648 F.2d 1354, 1364-1365 (D.C. Cir. 1980).

Like any other grand jury witness, petitioner has the right to have counsel present outside the grand jury room during his testimony and to consult with counsel whenever he wishes. Petitioner may also invoke the attorney-client privilege with respect to any communications that fall within the privilege. Thus, this case presents no reason to deviate from the settled rule that "[a] witness 'before a grand jury, cannot insist as a matter of constitutional right, on being represented by his counsel.' " *United States* v. *Mandujano*, 425 U.S. 564, 581 (1976) (plurality opinion) (quoting *In re Groban*, 352 U.S. 330, 333 (1957)).

Petitioner contends (Pet. 31-33) that the court of appeals' rejection of his Sixth Amendment claim conflicts with the decision of the Sixth Circuit in *United States* v. *Doss*, 563 F.2d 265 (1977) (en banc). As the court of appeals noted (Pet. App. A8-A9), however, *Doss* is easily distinguishable. There, the government called a defendant before the grand jury before he had been informed of his indictment and questioned him with the intention of obtaining evidence for the pending prosecution. The court of appeals reversed his conviction for perjury because it found improper the prosecutor's use of the grand jury process to gather evidence for a pending prosecution. The court explicitly held, however, that "where a defendant is indicted for a particular crime, that fact does not prevent his being called before a grand jury to give evidence upon a wholly different and separate offense so long as he is not questioned about the offense for which he stands indicted." 563 F.2d at 266.

Petitioner does not challenge the legitimacy of the grand jury investigation or the need for his testimony. Nor has there been any showing that the government had an improper purpose in calling petitioner. Moreover, petitioner has been convicted and sentenced, so it is clear that the government is not using the grand jury as a pretrial discovery device. Finally, the *Doss* court expressly distinguished situations such as the present one in which an indicted defendant is called before a grand jury to testify about matters other than the charges on which he has been indicted. Thus, the court of appeals' decision in this case does not conflict with the decision in *Doss*.

2. For the same reasons, petitioner's Fifth Amendment claim is without merit. Petitioner argues (Pet. 35-43) that, as a defendant in a pending criminal case, he has a Fifth Amendment right to remain silent that is broader than his privilege against compelled self-incrimination. Therefore, he argues, the use immunity he has been granted does not fully protect his Fifth Amendment rights.

At the outset, petitioner's assertion that he has a Fifth Amendment right to remain silent that is broader than his privilege against compulsory self-incrimination is contrary to this Court's decision in *Kastigar*. In that case, the Court squarely held that the immunity created by 18 U.S.C. 6002 "is coextensive with the scope of the privilege against self-incrimination." Although the government may not call a defendant as a witness at trial and force him to invoke his Fifth Amendment privilege, that prohibition simply reflects a recognition that no valid purpose would be served by forcing a defendant to invoke his privilege in the presence of the jury. *Kastigar* clearly establishes that there is no Fifth Amendment "right to silence" that survives once the privilege against compulsory self-incrimination has been supplanted, whether by a grant of immunity or otherwise.

The court of appeals' Fifth Amendment analysis is in accordance with well-settled law. Every court that has addressed the issue has held that a defendant whose appeal is pending may be compelled to testify under a grant of use immunity. See *In re Grand Jury Proceedings (Garcia Rosell)*, 889 F.2d 220, 222 (9th Cir. 1989); *United States* v. *Kember*, 648 F.2d at 1362-1363; *United States* v. *Pantone*, 634 F.2d 716, 719 (3d Cir. 1980); *United States* v. *Kelly*, 464 F.2d 709, 712-713 (5th Cir. 1972). Thus, as long as the government can meet its burden of showing that its evidence in any subsequent retrial of petitioner is untainted by his grand jury testimony, petitioner's Fifth Amendment rights have not been violated.

3. Petitioner's final claim (Pet. 44-45) is that the prosecutor's interrogation of him before the grand jury without the presence of counsel violated Disciplinary Rule 7-104(A)(1). That rule provides that an attorney shall not "[c]ommunicate * * * on the subject of a representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

The court of appeals correctly rejected that claim. At the very least, contacts between defendants and prosecutors in the course of grand jury proceedings are "authorized by law" within the meaning of the rule. Federal prosecutors are legally authorized to investigate and prosecute federal crimes, see 28 U.S.C. 547, and an integral part of that duty is the responsibility to conduct grand jury investigations. In this case, the prosecutor obtained a court order directing petitioner to testify and thus at least implicitly authorizing the prosecutor to conduct the questioning before the grand jury. Moreover, even if petitioner were correct that the rule prohibited the prosecutor from questioning him before the grand jury, he would not be entitled to an order prohibiting the questioning. Violations of ethical rules ordinarily do not

give rise to the sort of injunctive relief petitioner seeks. Instead, the proper course would be to report the prosecutor's conduct to the local bar authorities and seek disciplinary action. Accordingly, petitioner's "ethical rule" argument is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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